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No. 80-2162

IN THE

Supreme Court of the United States

October Term, 1980

RAMAH NAVAJO SCHOOL BOARD, INC.
and
LEMBKE CONSTRUCTION CO., INC.,
Appellants,
v.
BUREAU OF REVENUE, STATE OF NEW MEXICO,
Appellee.

On Appeal From The Court of Appeals of New Mexico

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss this appeal, or in the alternative, to affirm the judgment of the Court of Appeals of New Mexico on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

STATEMENT OF THE CASE

The appeal concerns a state's power to tax a non-Indian contractor's receipts from constructing school buildings for a school board. The tax is New Mexico's gross receipts tax,

§§7-9-1 *et seq.*, NMSA 1978, the same one involved in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and more recently in *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10 Cir. 1980), *reh. den.* 625 F.2d 991, *cert. den.* ____ U.S. ____, 49 L.W. 3619 (No. 80-812, February 23, 1981).

The taxpayer in this case is Lembke Construction Co., Inc., a non-Indian general construction contractor. It is a New Mexico corporation headquartered in Albuquerque, and it is licensed by New Mexico as a general building contractor. Tr. Proc. 128-129, 104; Jur. St. 45. Although the buildings Lembke constructed for the School Board are on Reservation land, Lembke constructs buildings on non-Indian lands throughout New Mexico; all the paperwork on the construction involved in this appeal, such as contracts, change orders, estimates, bids, and subcontracts, was the same used by Lembke for all its non-Indian projects. Tr. Proc. 144. Lembke's construction bids included New Mexico gross receipts tax as a cost of the project, as did the bid of Lembke's competitor. Jur. St. 47.

The state is not taxing education. Jur. St. 52. All of Lembke's taxable gross receipts were derived from constructing buildings under construction contracts between the School Board, as owner, and Lembke, as contractor. Jur. St. 47. Those contracts were for construction in phases of a number of school buildings on the Ramah Navajo Reservation in New Mexico. The School Board understood from the outset that the cost of the construction project included New Mexico gross receipts tax, Tr. Proc. 103, and Lembke and its competitor both included gross receipts tax as part of the total construction cost bid. Jur. St. 47. The construction contracts between the School Board and Lembke providing for the gross receipts tax as a cost of construction were approved by the BIA. Jur. St. 16.

During construction Lembke issued New Mexico nontaxable transaction certificates to subcontractors and material suppliers,

Jur. St. 48, the effect of which was to prevent pyramiding of the gross receipts tax by exempting the subcontractors and material suppliers from the gross receipts tax. §§7-9-51 and 7-9-52 NMSA 1978. Their use presupposes that the gross receipts tax will be paid on the general contractor's total gross receipts. *Ibid.* Lembke regularly paid the gross receipts tax to the state since 1974 when the construction project began and passed the economic burden of the tax on to the School Board[1] as part of the periodic construction draw procedure, in accordance with the construction contracts providing for the contractor to "pay all sales, consumer, use and other similar taxes required by law" and "to comply with sales and use tax laws." Jur. St. 47. There was no particular building or facility that could not be built because of the gross receipts tax. Tr. Proc. 125.

The School Board is a New Mexico corporation, Tr. Rec. I, 1. It was incorporated for the sole purpose of obtaining federal funds for the construction of its school buildings. Tr. Proc. 117. All monies used by the School Board to pay for Lembke's construction work came from direct Congressional appropriations aggregating in excess of $9 million.[2] No tribal funds were used to build the school facilities. Tr. Proc. 104; Jur. St. 46. The affairs of the School Board are controlled solely by enrolled members of the Navajo Tribe, Jur. St. 45, but the School Board in fact exercises a good measure of independence from the Tribe. Tr. Proc. 50, 71-72, 187, 248. The School Board is not a

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[1] The legal incidence of New Mexico's gross receipts tax is on the seller, Lembke, even though its economic burden may be passed on to the buyer, the School Board. *United States v. State of New Mexico,* 581 F.2d 803 (10 Cir. 1978).

[2] P.L. 92-369 (86 Stat. 508), P.L. 93-245 (87 Stat. 1071), P.L.,93-404 (88 Stat. 803), P.L. 94-165 (89 Stat. 977), 95-74 (91 Stat. 285), and P.L. 97-74, Jur. St. 46.

part of or equivalent to the governing body of the Navajo Tribe. Jur. St. 45.

Three years after construction began, Lembke, at the request of the School Board, filed a claim for refund with the state claiming that all gross receipts taxes for its construction receipts should be refunded. Tr. Rec. I, 3. The claim was denied, and Lembke and the Board filed a refund action in the New Mexico District Court. The Court denied their claim for refund, which denial was affirmed by the New Mexico Court of Appeals, ____ N.M. ____, 625 P.2d 1225 (Ct.App. 1980), *cert. den.* ____ N.M. ____, 627 P.2d 412 (S.Ct. 1981).

THIS APPEAL DOES NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS AND SHOULD ACCORDINGLY BE DISMISSED.

1. Taxation of Lembke's Receipts From Construction of Buildings on a Reservation Is Not Preempted by Federal Law.

The School Board and Lembke argue, based on the *White Mountain*[3] case, that the state's tax is preempted by federal law. This doctrine, however, has no application to Lembke's activity, given the facts of this appeal.

White Mountain holds that state taxes on a non-Indian's receipts from logging work on the White Mountain Apache Reservation were preempted because

> ". . . the Federal Government's regulation of the harvesting of Indian timber is comprehensive. That regulation takes the form of Acts of Congress, detailed

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[3] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578 (1980).

> regulations promulgated by the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs."
>
> 100 S.Ct. at 2584.

Justice Marshall expands this point, discussing in detail federal statutes, regulations and supervisory control exerted over the logger's daily activities.

The contrast between the detailed regulation of the taxed activity (logging) in *White Mountain* and the glaring lack of federal regulatory control of the taxed activity (construction of buildings) in this appeal, strikingly demonstrates the want of substance of this appeal. There was no federal regulatory scheme, comprehensive or otherwise, that governed Lembke's building construction activities. There were no Acts of Congress applying specifically to construction of the kind that Lembke did, no regulations of the Secretary of the Interior guiding its daily affairs, and there was no day-to-day supervision of its construction by the BIA. By the School Board's own admission the BIA exercised no substantive control over construction,[4] and in fact the BIA even opposed the School Board's plans for operating its own schools. Tr. Proc. 71. The lack of federal interest is dispositive, for "in the specific context" of this appeal "the exercise of state authority would [*not*] violate federal law." *White Mountain,* 100 S.Ct. at 2584.

Moreover, the statutes or regulations cited without explanation or analysis by Lembke and the School Board do not support their notion of preemption in this case. None of the monies made available to the School Board for construction were granted, disbursed or obtained under any of these statutes. These provisions had no direct application to Lembke's construction work for the School Board. The preemption argument

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[4] Tr. Proc. 62, 83-85, 109, 111-112, 116, 119-120.

lacks any significant support in the facts and record of *this* appeal.

The record demonstrates that New Mexico does have an interest in taxing the non-Indian activity at issue and how this interest overshadows whatever slight federal interest there may be. *White Mountain* concerned a non-Indian contractor who operated solely on the reservation and received little or no benefits from the state imposing the tax in question. Lembke, by contrast, is headquartered in Albuquerque and does business in this state with non-Indian entities. It derives substantial benefits from the State of New Mexico and receives the full panoply of state services and benefits available to citizens of New Mexico. *Commonwealth Edison Co. v. Montana*, ___ U.S. ___, 49 L.W. 4957 (No. 80-581, July 2, 1981). In addition New Mexico's direct and indirect expenditures on behalf of the Ramah Navajos in 1979, for example, were $390,000. Tr. Proc. 280. The state thus has a substantial interest in levying its non-discriminatory gross receipts tax. *White Mountain*, 100 S.Ct. at 2587; *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 2085 (1980); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940). The "particularized inquiry" called for by *White Mountain*, 100 S.Ct. at 2584, shows that in this instance New Mexico's tax does not violate federal law.

The weakness of the preemption contention in this case is obvious from the School Board's attempt to change the regulated subject from construction to education. Jur. St. 21. The School Board would have the focus be on the use to which the buildings are put, not on the taxed activity of construction. Its theory applied to the facts of *White Mountain* would disregard the logger's taxable activity and zero in on the use to which the logs were put. This is not the *White Mountain* test of preemption. New Mexico is taxing construction receipts, not education, and in a non-discriminatory manner. Jur. St. 52. The School Board's theory warrants no further examination by this Court.

2. This Court Has Already Declined To Hear the Same Issue This Term and It Should Do Likewise Here.

The substance of the question presented by this appeal is precisely the same as was rejected by this Court earlier this Term in *Mescalero Apache Tribe v. O'Cheskey*, No. 80-812, *cert. den.* ____ U.S. ____, 49 L.W. 3619 (February 23, 1981), 625 F.2d 967 (10 Cir. 1980), *reh. den.* 625 F.2d 991. There the issue was the taxability of a non-Indian construction contractor's gross receipts from building a resort complex on the Mescalero Apache Reservation. Here the contractor's gross receipts are from building a school complex. There the buildings were built with federal funds granted by the Economic Development Administration. Here the buildings were built with direct appropriations from Congress. The insignificance of these distinctions points to the same disposition of this appeal.

3. Congressional Funding of Construction by Direct Appropriations Does Not Preempt New Mexico's Tax.

No tribal funds whatsoever were used for construction of the school buildings for the Board. Jur. St. 46. Congress funded the School Board's construction program by a series of appropriations totaling well over $9 million to "Ramah Navajo School Board, Incorporated.[5] From this sole fact, and despite the absence of any language in the congressional appropriations prohibiting state taxes, Jur. St. 52, the School Board contends that the tax is preempted. Jur. St. 23. The contention is not valid. Congress makes direct appropriations to all manner of

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[5] See fn. 2.

entities without any effect on the state's powers to tax the local activity funded or made possible by the appropriation. For instance, even though government funds may be used for purchases by a federal defense contractor, a state may tax the contractor's receipts unless the contractor is the disclosed agent of the United States. *Kern-Limerick, Inc. v. Scurlock,* 347 U.S. 110 (1954). Congress has, of course, near plenary power to preempt state taxes as it chooses, and it has explicitly done so from time to time with regard to New Mexico's taxes. Section 466 of P.L. 95-524 (the CETA Amendments of 1978), 92 Stat. 1909 (1978), for example, expressly ousts New Mexico from jurisdiction to tax the gross receipts of certain Job Corps centers. See Cong. Rec. (S.2157, Daily Ed., February 23, 1978). Another example is 15 U.S.C. §391 which, this Court held, ousted New Mexico of the ability to tax the generation of electricity in a way that Congress felt interfered with interstate commerce. *Arizona Public Service Co. v. Snead,* 441 U.S. 141 (1979). Examples of expressly shielding federal money from all state taxes are 31 U.S.C. §742 (U.S. bonds) and 7 U.S.C. §2017 (food stamps). Consequently, the fact that Congress had not spoken with respect to the $9 plus million it gave to the School Board, much of it appropriated after construction had been budgeted to include the gross receipts tax, shows either that Congress intended not to preempt state taxes or that Congress had no intent whatever on the subject.

4. Other Issues Raised Are Without Merit.

It is well-settled that the Enabling Act for New Mexico, 36 Stat. 557 (1910), is of no significance here, for it is a disclaimer of proprietary interest only, not a disclaimer of governmental interest or of jurisdiction to tax non-Indians. *Organized Village of Kake v. Egan,* 369 U.S. 60 (1962), *Mescalero Apache Tribe*

v. Jones, 411 U.S. 145 (1972), *Washington v. Confederated Tribes of Colville Indian Reservation,* 100 S.Ct. at 2082. Nor will the effect of the New Mexico Court of Appeals' decision be the creation of one rule for New Mexico Navajos and another for Arizona Navajos, as claimed by the School Board.[6] Jur. St. 24. New Mexico of course taxes construction receipts, and so does Arizona. Ariz. Rev. Stat. §42-1310.2(i). Nor do the Indian traders statutes, 25 U.S.C. §§261-264, have any bearing on this case. They were enacted "to protect Indians from becoming victims of fraud in dealing with persons selling goods," *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 U.S. 160, 100 S.Ct. 2592, 2596, and *Colville,* 100 S.Ct. at 2082, not to protect tribes or school boards when they enter into multi-million dollar construction contracts with the use of federal funds. Furthermore, the statutes speak of "articles" and "goods." They do not attempt to regulate rendering of construction services, which was what Lembke was doing. Tr. Proc. 162, 140; see §7-9-3(K) NMSA 1978.

CONCLUSION

The State of New Mexico respectfully submits that the questions raised by this appeal are so insubstantial as not to need further argument or examination. It moves the Court

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[6] Even if this were true, the claim would not be an appealable issue, for the states are not required to levy their taxes in a phalanx of uniformity. "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden v. Kentucky,* 309 U.S. 83, 88 (1940), quoted in *Austin v. New Hampshire,* 420 U.S. 656, 661 (1975).

to dismiss the appeal or alternatively to affirm the judgment entered by the Court of Appeals of New Mexico.

Respectfully submitted,

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